THE NEW FEDERAL EQUITY RULES.

ON November 4, 1912 the Supreme Court of the United States, by formal order, adopted and established a code of rules for the courts of equity of the United States, which should take the place of all rules theretofore prescribed by the Supreme Court and then in force. Rule 81 provides: "These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice. All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect."

In pursuance of said order the rules so promulgated now regulate the procedure in the federal courts of equity.

Yielding to a request which he is willing to regard as a demand for the discharge of an obligation, the writer ventures to submit some observations on the authority for making said rules, the occasion of their making, the manner in which the work was done, and the changes wrought by them in the equity procedure of the federal courts.

Statutory Authorization of Courts to Adopt Rules of Procedure.

The Judiciary Act of September 24, 1789, provided: "That all said courts of the United States shall have power * * * to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[1]

By act entitled, "An act to regulate Processes in the Courts of the United States" approved September 29, 1789, Congress made specific provisions as to the procedure in said Courts in these words: "That until further provisions shall be made, and, except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions * * * in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes

[1] Stat. At. L. 83.

of equity, and of admiralty and of maritime jurisdiction, shall be according to the course of the civil law."[2]

This latter act is supplementary to the Judiciary Act of September 24, 1789. Its purpose was to direct, temporarily, and until further provision should be made by rules, the procedure in the said courts. The statute is mentioned in this connection because it shows the inclination of the First Congress that proceedings on the law side of the court should be conducted in conformity with the practice in the respective states, but on the equity side of the court in conformity with the practice of the English Court of Chancery, and further because reference is made to this act in the ensuing legislation on the subject. This act by its terms was to continue in force until the end of the next session of Congress and no longer.

The Second Congress by act approved May 8, 1792, entitled, "An act for regulating Processes in the Courts of the United States etc." provided: "That the forms of writs, executions and other process except their style, and the forms and modes of proceedings in suits in those of common law shall be the same as are now used in the said Courts respectively in pursuance of the act entitled 'An act to regulate processes in the courts of the United States'; in those of equity and those of admiralty and maritime jurisdiction according to the principles, rules and usages which belong to the Court of Equity and to the Courts of Admirality respectively as contradistinguished from courts of common law: except so far as may have been provided by the act to establish the judicial courts of the United States, *subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient or to such regulations as the Supreme Court of the United States shall think from time to time by rule to prescribe to any circuit or district Court concerning the same.* * * * [3]

The Twentieth Congress by act approved May 19, 1828, entitled "An act to regulate processes in the courts of the United States"[4] extended the provisions of the Act of May 8, 1792 to the Courts of the United States held in those states admitted into the Union after May 29, 1792, but did not abridge or enlarge the power and authority of the Supreme Court to adopt rules, as the same was conferred by the Act of May 28, 1792. It may be said, however, that the Act of May 19, 1828 added strength to the manifest disposition of the Congress that in actions at law the procedure in the

[2] 1 Stat. At. L. 93-94.
[3] 1 Stat. At. L. 276.
[4] 4 Stat. At. L. 278.

federal courts should, as near as might be, conform to the procedure then used in the highest court of original and general jurisdiction in the state wherein the federal court was held.

The Twenty-seventh Congress by act approved August 23, 1842, entitled, "An act further supplementary to an act entitled 'An act to establish the Judicial Courts of the United States' passed the twenty-fourth of September, seventeen hundred and eighty nine" provided: § 6. "That the Supreme Court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings in suits at common law or in admiralty and equity pleading in the said courts, and also the forms and modes of taking and obtaining evidence and of obtaining discovery and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the Court, so as to prevent delays and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit.[5]

The substance of the foregoing section is embodied in the Revised Statutes and stands therein as § 917. The phraseology of § 917 differs in some unimportant particulars from that of § 6, of the Act of August 23, 1842.

And so stands the legislation authorizing the Supreme Court of the United States to promulgate rules, from time to time, to regulate the procedure in the federal courts of equity.

It is apparent, from the acts above referred to, that the Congress gave direction to procedure both in the courts of common law and in the courts of equity; in the former the procedure was destined to be as varied as the several states might direct in respect to their own courts of original and general jurisdiction; in the latter as constant or staid as the action or inaction of the Supreme Court might incline. In respect to procedure in the courts of equity, the acts above referred to have been generally understood to adopt the principles, rules and usages of the Courts of Chancery of England.[6]

It was held at a comparatively early day that Congress had by the Constitution exclusive authority to regulate the proceedings in the courts of the United States and might delegate that power to the courts themselves.[7]

[5] 5 Stat. At. L. 516.

[6] It was so ruled as to the Act of May 8, 1792. Hinde v. Vattier, 5 Pet. 398.

[7] Wayman v. Southard, 10 Wheat 1, 41.

Formulation of Rules of Practice for the Courts of Equity of the United States.

It has already appeared that, by the Act of September 29, 1789, Congress made provision for the general, but temporary, regulation of processes in the courts of the United Ctates. The act itself suggests that Congress expected, if it did not enjoin, that further provision should be made to regulate the processes in said courts before the end of the next ensuing Congress, because, by its own terms, the act was to continue in force only to that time. The expectation or injunction of Congress, whichever it may have been, or whether it really existed, or has been fancifully inferred, was soon realized or promptly obeyed. At an early period after the organization of the federal courts each of them adopted rules for the regulation of practice therein, with special reference to the practice of the state courts. At that time the English practice generally prevailed.[8] The rules prescribed by the equity courts themselves, under the sanction of the statute, continued to guide their practice down to July 1, 1822.

The Supreme Court of the United States, within the February term 1822, prescribed and promulgated rules of practice for the courts of equity of the United States. Those rules were thirty-three in number. The court ordered that said rules be the rules of practice for the courts of equity of the United States, from and after the first day of July then next ensuing. Rule 33 provided: "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the practice of the High Court of Chancery in England." These rules are to be found in 7 Wheat. xvii-xxi. They continued in force for a period of twenty years, when they were superseded by rules prescribed and promulgated by the Supreme Court in 1842. The rules of 1842 were directed to go into effect on the first of August of that year. In these rules we again find reference to the practice of the High Court of Chancery in England and a direction that its practice shall be followed so far as it may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.[9]

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[8] Anonymous, 1 Peters C. C. R. 1.

[9] Rule XC.

The rules of 1842 were originally published in 17 Peters, an unofficial volume not found in the ordinary collection of the United States Supreme Court Reports. They appear in Vol. 20 L. Edn. 910 et seq. Reference is made in various places to the fact that these rules were published in 1 How. The law library of the University of Michigan

Provision was made that any circuit court might in its discretion adopt these rules, which were promulgated March 2, 1842, previous to the time when, by the terms of the rules, they were to take effect, namely August 1, 1842, and when, and as soon as these rules shall so take effect and be in force, the rules promulgated in 1822 shall, henceforth, cease and be of no further force or effect.[10]

The rules of 1842, with some modifications, amendments and additions, continued to be the rules regulating the practice in the equity courts of the United States down to the going into effect of the New Federal Equity Rules February 1, 1913.[11]

They were molded in the forms of the English Chancery practice. Some of them may be followed back to the hundred rules of Lord BACON, the foundation of the practice of the Court of Chancery; many of them are traceable directly to the later rules of the English Chancery Court; all of them were based upon the practice

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embraces two sets of what purports to be the official reports of the Supreme Court of the United States in neither of which are the said rules printed in 1 How.

[10] This provision stood as rule 92 but, that rule not being a rule of practice, but simply a direction as to the taking effect of the rules and being of no force or effect after August 1, 1842, was not included in the subsequent numbering of the rules.

[11] The rules of 1842 were amended, modified and added to, as follows:

Rule 13 was amended May 3, 1875. 21 Wall v. The amendment consisted in providing that the subpoena under certain circumstances might be left, "with some adult person" whereas the original provided that it might be left, "with some free white person." Just the difference between 1842 and 1875.

Rules 18 and 19 were amended October 28, 1878. 97 U. S. viii. The amendment to rule 18 relates to the time when a decree may be entered upon a bill taken as confessed, and fixes that time at any time after the expiration of thirty days from and after the entry of the order that the bill be taken pro confesso, whereas the original fixed the time "at the next ensuing term of the court." The amendment in rule 19 is of similar import.

Rule 40 was repealed and annulled by order of the court in the December term, 1850, and this provision was made as a substitute for rule 40. "And it shall not, hereafter, be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery." The original rule provided: "That a defendant shall not be bound to answer any statement or charge in the bill unless specially and particularly interrogated thereto."

Rule 41 was amended March 6, 1872, 13 Wall. xi. The original and the amended rule related to interrogatories put to the defendant; neither is important now.

Rule 67 provided for taking of testimony and originally consisted of a single paragraph. This was amended December term 1854. 17 How. vii. Five paragraphs were added December term 1861, 1 Black 6, amended October term 1890, 139 U. S. 707. Another paragraph was added December term 1869, 9 Wall. viii; another May 2, 1892, 144 U. S. 689; another May 15, 1893, 149 U. S. 792.

Rule 82 was amended April 16, 1894, 15 United States 709. The rule relates to the appointment of standing and special masters in Chancery, their duties and compensation. The following rules were added to those promulgated in 1842:

Rule 92 was promulgated April 18, 1864, 1 Wall. vii.

Rule 93 was promulgated January 13, 1879. 97 U. S. vii.

Rule 94 was promulgated January 23, 1882. 104 U. S. ix.

See Hopkins' New Federal Equity Rules 66-141.

of that court, a practice which curiously enough was retained in the place of its adoption long after it had been abandoned in the home of its origin. And lest the specific rules should fail in any way sufficiently to provide for a close following of the English practice, a general rule was added, as heretofore observed, directing in the first instance (Rules of 1822) that "in all cases where the rules prescribed by this court * * * do not apply, the practice in the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England;" in the second instance, (Rules of 1842) that "in all cases where the rules prescribed by this court * * * do not apply, the practice of the Circuit Court shall be regulated by the *present* practice of the High Court of Chancery in England, so far as the same may be reasonably be applied consistently with the local circumstances and local convenience of the District where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice."[12]

These rules had, and the new rules which have superseded them will have, all the force and effect of law, and were and will be binding as such upon all suitors before the court. The government itself was not and will not be exempt from their operation and control. This results from the well recognized and conceded fact, that when the United States voluntarily comes into its courts seeking relief against an individual, it comes not as a sovereign, but as a suitor, and although it is the creator of the court and the fountain head from which all rules of procedure issue, it stands before the Court in the same light as any other suitor.[13]

The Occasion for New Rules.

The rules of 1842, with their amendments and additions, were doubtless suited to the times of their adoption. The source from which they sprang, the practice on which they were founded—the practice of a court which had reached a high state of efficiency not only by reason of its great age, but more by reason of the distinguished ability of the eminent chancellor who gave its procedure

[12] "The present practice of the High Court of Chancery in England," said the Court in Thomson v. Wooster, 114 U. S. 104, 112, "which by our roth Rule was adopted as the standard of equity practice in cases where the rules prescribed by this court * * * do not apply" is exhibited in the 1st edition of Daniell (published 1837) and the 2nd edition of Smith's Chancery Practice(published the same year). These were the most authoritative works on English Chancery practice in use in March 1842, when our Equity Rules were adopted. The practice as exhibited by these works was supplemented by the general orders made by Lords Cottenham and Langdale in August 1841, many of which were closely copied in our rules.

[13] United States v. Barber Lumber Co. et al., 169 Fed. 184, 186.

direction, and of its successive chancellors,—the inherent appropriateness of the rules themselves, warrant the conclusion that they were as good as any that could have been adopted. On the whole they served their purpose well. But long since, they became the subject of dissatisfaction and criticism. They were charged with being unsuited to the growing and changing conditions. The procedure which they prescribed was declared to be too cumbersome, too slow, too expensive. The natural and judicious conservatism of the Supreme Court operated to prevent its lending a too ready or too willing ear to complaints and criticisms of a system which had existed without substantial change for a period of seventy years—really for quite a century,—a system to which the bar had become accustomed by long usage and which was quite well understood through construction in numerous cases where the procedure had been challenged as doubtful or dubious. A fixed practice appeals to bench and bar alike. Precedent is the very citadel of those who are ruled by the common law as well as of those who are concerned with its administration and enforcement. It is proper that we should, and a verity that we do, in all our public concerns, give heed to the wholesome maxim so aptly expressed in our great Declaration. "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; accordingly all experiences hath shown, that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed". The legitimate offspring of this principle was the disposition that induced a retention of the rules of 1842, as modified from time to time, long after their inappropriateness to existing conditions had been pointed out by lawyer and layman, long after the procedure which they prescribed had been simplified in the court from which it was borrowed. Widespread public dissatisfaction with the old rules was the prime occasion for prescribing the new.

How the New Rules were Formulated.

The power to revise the rules of procedure in the federal courts of equity is lodged exclusively in the Supreme Court. The New Federal Equity Rules emanted from that Court. But the formulation of these rules was the work of a committee composed of forty-five members. The Supreme Court was represented on the committee by the Chief Justice and Justices LURTON and VAN DEVANTER. The several circuit courts of appeals were requested to appoint, and did appoint, members of the bar within their respective

circuits to cooperate with the Supreme Court or its committee in the formulating of revised rules of practice. The committee as finally made up, included, aside from the representatives of the Supreme Court, forty-three members of the bar, conspicuous in their respective circuits for their professional learning and ability and for their aptitude for the special work by reason of their experience as practitioners in the federal courts. The first circuit was represented on the committee by three members, the second by nine, the third by six, the fourth by three, the fifth by six, the sixth by four, the seventh by four, the eighth by three, and the ninth by five. It may be taken for granted that the committee as constituted would reflect the ideas and sentiments, pertaining to the general subjects, of the whole country, and as a whole would be able to choose and recommend for adoption the best features of procedure. The Supreme Court had not, prior to this time, at least in any formal or significant way, called to its aid in work of like character the services of representatives of the bar of the country. On the committee were representatives of practice under the code, prepared to urge for adoption whatever was of substantial value under that practice. There were also representatives of practice in jurisdictions where the common law courts and equity courts were separate and distinct tribunals, competent to point out whatever was of advantage in a complete separation of common law courts and equity courts and what should be retained and what abandoned of the old system of equity procedure. There were also representatives of practice in jurisdictions where the distinction between common law actions and suits in equity was maintained, but in courts presided over by the judge or by the chancellor as the nature of the business in hand might require, qualified to suggest whatever was meritorious in the particular procedure under that system. Probably no feature of practice followed in any state in the union was unrepresented in the committee as it was constituted. The present English procedure was carefully examined. Mr. Justice LURTON, representative of the Supreme Court, visited England with the view of studying that procedure in its actual operation. He consulted the Lord Chancellor and received from him valuable suggestions,[13a] the result of which is that many of the features of the English procedure are adopted in the new rules. Members of the committee from the several circuits made suggestions which were considered and adopted or rejected as seemed to the entire committee best. The manner in which the work of revision was

[13a] Hopkins' New Federal Equity Rules, 27 et seq.

done, the character and ability of the men who had it in charge, the adoption of the recommendations of the committee by the Supreme Court, leaves no cause for doubt that the new rules embody the best thought of the bench and the bar of the country in the matter of what, in view of all the circumstances, should be the proper procedure of the equity courts of the government.

Changes in Procedure made by the New Rules.

It is not within the purpose or scope of this article to consider in detail the changes in procedure made by the new rules. Anything more than a brief review of the more radical and significant changes will not be attempted. But the writer feels that that is enough, and that he can be of service to the readers of this review who will heed his advice to read the new rules and study them in comparison with the old, and not by submitting his own comments upon them.[14] First of all it will be observed that the great fundamentals of former rules are preserved. The court of equity stands as it did stand. The distinction between actions at law and suits in chancery is not disturbed. The procedure of the court is simplified. The old and unimportant distinctions are eliminated, archaic forms are discouraged. Procedure which tends to or results in delay is abolished, and in its place is substituted a procedure better calculated to speed the cause to issue and to determination. The changes made contemplate less delay and less expense.

Many of the new rules are identical or substantially identical with former rules. In this class may be included rules 7, 9, 11, 13, 14, 15, 17, 27, 35, 40, 41, 42, 44, 60, 63, 64, 65, 70, 71, 74, and 78. Of the eighty rules constituting the new code, twenty-one are substantially identical with former rules. Many of the former rules are included in substance in the new rules, with such minor changes in arrangement and phraseology as would exclude them from the identical and substantially identical class. In this class are rules 10, 19, 54, 59, 61, 62, 66, 68, 69, and 72. The remaining rules are in part founded upon and adopted from the rules regulating the present practice in the court of chancery in England. Some few of the number are new or original in the respect that they are so much a departure from the form and substance of the English rules that decisions on the latter would not be safe precedents for the construction of the former.

[14] The rules are published in full, 198 Federal, xix-xli; 33 Sup. Ct. vii-xliii; Hopkins' New Federal Equity Rules, 1913; Callaghan & Co.'s Reprint 1913.

As to Pleadings.

The technical forms of pleadings in equity are abolished. (Rule 18.)

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (Rule 19). This mandatory provision which closes the foregoing rule is of striking significance. The substance must never be sacrificed to the form. The livery in which the suitor appears is made unimportant by the imperative provisions of the rule.

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms as to costs and otherwise, as may be just. (Rule 20).

The right to except to bills, answers and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit. (Rule 21).

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential. (Rule 22).

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court. (Rule 23).

These several provisions are new. They are based upon analogous rules of the English chancery practice. They effect material changes in the course of procedure in the federal equity courts.

Every bill or other pleading shall be signed individually by one or more solicitors of record and such signature shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay. (Rule 24).

This rule embodies in its provisions former rule 24 which required that the bill only should be signed by counsel "as an affirmation on

his part that * * * there is good ground for the suit." The signature of counsel to all pleadings is required as a voucher that the defense is not fictitous or collusive as well as "that the case is not a mere fiction."

Rule 25 deals with the bill of complaint. It is a substitute for the matter contained in former rules 20, 21, 22, 23, and 24. It provides: "Hereafter it shall be sufficient that a bill of equity shall contain in addition to the usual caption:

"First, the full name, when known, of each plantiff and defendant and the citizenship and residence of each party. If any party be under any disability that fact shall be stated." (The address or salutation made imperative by former rule 20 is not required, but it may be doubtful whether the language of the rule is tantamount to a prohibition of its use.)

"Second,a short and plain statement of the grounds upon which the court's jurisdiction depends".

"Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." (This provision is evidently the offspring of a desire to avoid unnecessary prolixity in the framing of bills, but it embodies only what has long been recognized as a fundamental rule of equity pleading.[15]).

"Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court or cannot be made parties without ousting the jurisdic-

[15] In his comments on this provision Mr. Hopkins says: "But it makes no provision for those recitals of conditions precedent that have been held essential to the sufficiency of bills for patent infringement, and the like. Does the third paragraph of Rule 25 mean to dispense with such recitals? It is by no means clear. It would have been clear and unequivocal had the rule been drawn as suggested by the Bar Committee appointed by the Circuit Court of Appeals for the Sixth Circuit, which reads as follows:

"Provide that it shall be sufficient in pleading a judgment or other determination of a court, or of an officer of special jurisdiction, or a patent, or other public grant, to allege that it was duly made or issued; that in pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and that it shall not be sufficient in any case herein mentioned to deny the allegation generally, but the facts relied upon must be specifically stated."

"This rule is suggested, because it has been held on the circuit that it is not sufficient, in a bill for the infringement of a patent, to allege that the patent was duly issued, but that it is necessary to aver all the facts on which authority to issue the patent depends. The result is that bills in such cases are unnecessarily prolix."

As is has been repeatedly held that the recital of conditions precedent is not a "mere statement of evidence," and as the rule of stating ultimate facts has always obtained, it is the writer's opinion that the third paragraph of Rule 21 does not relieve the pleader of the necessity of pleading such conditions precedent, precisely as heretofore.

Hopkins' New Federal Equity Rules, pp. 158-159.

tion." (This provision is substantially a repetition of former rule 22.)

"Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be vertified by the oath of the plaintiff or someone havknowledge of the facts upon which such relief is asked."

The prayer for subpoena is not required. The preceding rule 12 provides that when the bill is filed the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff.

Under former rule 23 a bill was demurrable which omitted a prayer for process, and the clerk was without authority to issue a subpoena thereunder. It is provided by Rule 26 that the plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. If there be more plaintiffs than one, the causes of action joined must be joint; if there be more defendants than one, the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials. Rule 26 is adapted from the English rule covering analagous subjects. This rule is aimed at the uncertain and vexatious objection relating to multifariousness.

Rule 28 provides that the plaintiff may amend his bill as of course at any time before the defendant has responded thereto, but after pleading filed by the defendant, only by consent of the defendant or leave of the court or judge.

Demurrers and pleas are abolished by Rule 29, which provides further; "Every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. * * * "

Rule 30 deals with the answer and prescribes its contents. It provides in substance; The defendant shall in short and simple

terms set out his defense to each claim asserted by the bill, he shall specifically admit, deny or explain the facts upon which the plaintiff relies unless he is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed except as against an infant, lunatic or other person *non compos* and not under guardianship * * *. The answer may state as many defenses in the alternative, regardless of consistency, as the defendant deems essential to his defense. The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may without cross-bill set out any set-off or counter-claim against the plaintiff which might be the subject of an independant suit in equity against him and such set-off or counter-claim so set up, shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgement in the same suit both on the original and cross-claims. Thus the necessity of the cross bill is dispensed with, but is it abolished? The language of the rule would seem clear to the effect that it is obligatory upon the defendant to set up in his answer and litigate in that cause any counter-claim he may have arising out of the subject matter of the suit, but that it is permissible to him, but not obligatory upon him, to set up and litigate in that cause any set-off or counter-claim against the plaintiff which might be the subject of an independent suit. No reply to the answer is required, but the cause shall be deemed at issue on the filing of the answer. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply, and failing to do so within the time required, shall be in default, whereupon a decree *pro confesso* on the counter-claim may be entered. (Rule 31).

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may upon five days notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms or strike out the matter. (Rule 33).

Rule 33 takes the place of former rules 61-65 and provides for a simpler and speedier mode of testing the sufficiency of the answer.

As to Parties.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly author-

ized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reasons be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to and in recognition of, the propriety of the main proceeding. (Rule 37).

This rule makes a substantial change in the procedure in respect to parties plaintiff. In the former rules there was no provision requiring that every action should be prosecuted in the name of the real party in interest. When the question is of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. (Rule 38.)

The rule itself is new but the matter embodied in it is not a new principle of equity. It is clearer and more explicit than former rule 48 which it supersedes.

In all cases where it shall appear to the court that persons who might otherwise be deemed *proper* parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. (Rule 39.)

This rule is identical with former rule 47 save that it omits the words *"necessary or"* before the word *"proper."* The omission of the word *necessary* was designed to eliminate the distinction between *necessary* parties and *indispensable* parties. Parties to a suit in equity have been classified by the Supreme Court of the United States into, 1. proper parties, 2. necessary parties, 3. indispensable parties—a classification induced by the presence of the word *necessary* in former rule 47. The rule in its present form will eliminate the forced distinction between necessary parties and indispensable parties.

As to Process.

The rule-day and the appearance-day of the former rules are abolished. The process of the court is made returnable into the clerk's office within twenty days from the issuing thereof. (Rule 12.) The defendant is required to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12.

As to the Taking of Testimony.

In all trials in equity the testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered, as in actions at law. (Rule 46).

This makes a marked change in respect to trials of equity causes. Taking the testimony in open court is now the rule, taking it before commissioners is now the exception. Under the former rules, taking the testimony in a case before commissioners appointed by the court was the rule; taking it in open court the exception.

Provision is made for the departure from the rule requiring the testimony of witnesses to be taken orally in open court, when allowed by statute or by order of the court for good and exceptional cause to be shown by affidavit. All depositions taken under a statute or under such order of the court shall be taken and filed in the manner following: Those of the plantiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

The manner of taking testimony under the old rules may be exemplified by what occurred in a given case. A few years ago railroads operating in Michigan brought suit in the Circuit Court of the United States for the Western District of Michigan to restrain the Auditor General of the state from enforcing against them the provisions of an Act of the Legislature of Michigan for the assessment of the property of railroad companies, for the levying of taxes thereon by the State Board of Assessors and for the collection of such taxes.[16]

The testimony in the causes was taken by a special commissioner appointed by the Court, who, with counsel for the respective parties in attendance, went from place to place in Michigan and in other

[16] Michigan Central R. R. Co. v. Powers, Auditor General, 201 U. S. 245. Other cases ruled by the decision in the above case referred to by their docket titles, Id. 302.

states wherever it was deemed necessary or advisable to examine witnesses for the purpose of taking the testimony of such witnesses. The commissioner caused the testimony of the witnesses to be taken stenographically and subsequently transcribed. The testimony thus produced was filed in the cause and duly published. The solicitors made their separate abstracts thereof and caused the same to be printed for the use of the court on the hearing of the cause. The commissioner did little else than swear the witnesses and superintend the making up of the certificates. This method of taking testimony was not only attended with great expense (a matter of no great significance where the parties on one side were railroad companies and on the other side the State of Michigan, but a matter of great concern to ordinary litigants), but the cost of taking testimony in such a manner is perhaps not the leading objection to the method. If the facts in the case were involved, and the decision on them a close question, the court would be deprived of an imporant, and in many ways a controlling, factor in determining how the question of fact should be decided. It would be deprived of the opportunity of meeting the witnesses face to face and observing their conduct and demeanor on the stand; their candor in testifying, or their lack of candor; their hesitation and evasion. Close questions of fact, all know, are often determined on appeal out of no other consideration than that the trial judge saw the witnesses and heard them testify, and for that reason the finding of fact will not be disturbed by the appellate tribunal.

The substantial features of the former rules in relation to taking testimony by depositions *de bene esse* have been preserved in the new rules.

By the provisions of new Rule 55, any deposition or affidavit taken under these rules, or any other statute, shall be deemed published when filed, unless otherwise ordered by the court, which constitutes a wholesome change in the procedure.

As to the Form of Decrees.

A recital in the decree of pleadings and evidence and of facts is rendered unnecessary by Rule 71, which provides as follows:

"In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree or order shall begin in substance as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered,

adjudged and decreed as follos, viz.:' (here insert the decree or order)."

By the provisions of Rule 73, no preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by a vertified bill, that immediate and irreparable loss and damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time and in no event later than ten days from the date of the order, and shall take precedence of all matters except older matters of the same character.

Rules 75, 76 and 77 relate to the matter of appeal and the record on appeal. Without going into detail it is sufficient to state that the purpose of those rules is to reduce the expense and eliminate needless recitals and repetition of exhibits and other evidence. Every practitioner who had occasion to take an appeal under the former rules had to be constantly on his guard lest immaterial matters should be returned in the appeal and printed in the record without serving any more useful purpose, in many instances, than to increase the ultimate cost of review in the appellate court.

The writer is sensible that he has passed the limits set to this article. He is sensible too, that he has omitted many things from his observations which would be necessary to a complete review of the subject; but, as heretofore observed, each person must study the rules himself and compare them with the rules they displace in order to have a working knowledge of them.

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